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IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

EL PASO NATURAL GAS COMPANY,
CYPRUS FOOTE MINERAL COMPANY,
AND CYPRUS AMAX MINERAL COMPANY,
Petitioners,

v.

LAURA NEZTSOSIE; ARLINDA NEZTSOSIE; and ZONNIE MARIE DANDY RICHARDS, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF HAROLD J. RICHARDS, SR.
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF LEWIS COUNTY, IDAHO, *AMICUS CURIAE*, IN SUPPORT OF PETITIONERS, EL PASO NATURAL GAS COMPANY, ET AL.

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INTEREST OF AMICUS CURIAE

1. The primary concern that prompts the filing of this *amicus curiae* brief can be simply stated. Even less than the private-sector, local governmental units confronted with tribal exhaustion issues can ill afford the delay and the additional expenditure of scarce resources that will be occasioned by the Ninth Circuit's expansive and almost mechanical application of a doctrine this Court has recently narrowed (and correctly so). *Strate v. A-1 Con-*

tractors, 117 S.Ct. 1404 (1997). In Lewis County, Idaho, and in other counties similarly situated across the nation, millions of dollars have been squandered in tribal exhaustion litigation in recent years. *See generally Duncan Energy v. Three Affiliated Tribes*, 27 F.3d 1294 (8th Cir. 1994) *cert. denied*, 115 S.Ct. 779 (1995); *Reservation Telephone Cooperative v. Three Affiliated Tribes*, 76 F.3d 181 (8th Cir. 1996). And in most instances, the burdensome delay that has resulted from similarly impractical applications of this doctrine would be intolerable in any other circumstance. For these reasons, Lewis County, Idaho, individually, and as a representative of other counties similarly situated, respectfully submits this *amicus curiae* brief in support of the general proposition that this Court continue to appropriately limit the scope of the tribal exhaustion doctrine, as it did in *Strate*.[1]

2. Lewis County is also currently an appellee before the Ninth Circuit Court of Appeals, in a case that involves general issues of tribal court jurisdiction, *County of Lewis v. Allen and Nez Perce Tribe*, No. 94-35979, 1998 WL 191233 (9th Cir. Apr. 23, 1998, amended May 5, 1998, and July 24, 1998) (withdrawn). Lewis County is a subdivision of the State of Idaho which, through its Sheriff's Department, is responsible for enforcement of state criminal law within county boundaries. Approximately ninety percent of Lewis County is also located within an area claimed by the Nez Perce Indian Tribe as part of the

[1] Lewis County belongs to a local Idaho entity, the North Central Idaho Juridictional Alliance ("NCIJA"). NCIJA is an unincorporated association; its members include three (3) counties, eight (8) cities, three (3) school districts and seven (7) highway districts in north central Idaho whose geographical boundaries include land which was within the Nez Perce Indian Reservation as it existed prior to 1894. The purpose of NCIJA is to provide an organization to foster cooperation between its members and to focus their efforts toward obtaining an adjudication of their jurisdictional authority in relationship to the jurisdictional authority of the United States and the Nez Perce Tribe.

Nez Perce Tribe's Reservation. This same geographic area of Lewis County contains most of the Lewis County residents, of which approximately ninety percent (90%) are not Indian. In addition, ninety percent (90%) of the land in this area is fee land, not owned by the Nez Perce tribe or any tribal member.

In the 1960's, the State of Idaho assumed certain jurisdiction pursuant to Public Law 280 over the conduct of tribal members engaged in state crimes in Indian country. The *Allen* case involves the power of the Nez Perce Tribe to adjudicate tort claims against county law enforcement officers for their actions in enforcing state criminal law, pursuant to this federal authority (if the area is an Indian reservation), or pursuant to otherwise applicable state law (if the area is not an Indian reservation).

The Nez Perce Tribe does not have the authority to regulate the procedural aspects of the Lewis County Sheriff's Department as that Department's officers perform their law enforcement function. Lewis County has a significant and continuing interest in ensuring that civil claims brought against Lewis County law enforcement officers, as a result of the enforcement of state criminal law within the county, be litigated in a neutral forum that will properly safeguard the rights of all parties to the litigation.

The *Allen* case arose out of the arrest of a member of the Nez Perce Tribe (John Allen) by a Lewis County deputy sheriff. Mr. Allen was charged under a state law offense for disturbing the peace. It is undisputed that the sheriff's deputy had the right to be on the fee land in question to investigate the type of complaint at issue. If the fee land is within a continuing reservation, pursuant to Public Law 280, 25 U.S.C. §§ 1321-36, the Nez Perce Tribe has previously consented to the State of Idaho's assumption of concurrent criminal jurisdiction over a number of minor offenses. If the area was not Indian country, it is undisputed that only State law would apply.

Shortly after John Allen was arrested and charged with the crime of disturbing the peace, a state magistrate judge found that probable cause existed to prosecute Mr. Allen on the charge. The charge against Mr. Allen was subsequently dismissed at trial. Mr. Allen then filed suit in the Nez Perce Tribal Court against the deputy sheriff who arrested him, the sheriff, and Lewis County, seeking damages for, among other things, false arrest and malicious prosecution.

Because of the exhaustion doctrine, Lewis County first litigated the question in tribal court. *Over five and one-half years later,* the Nez Perce Tribal Court of Appeals affirmed the tribal decision confirming tribal jurisdiction and the tribal judgment (which included an award of punitive damages, even though the tribal jury had concluded that the arresting officer had acted in good faith).

Having exhausted their tribal court remedies, Lewis County and its law enforcement officers then filed a suit in federal district court, seeking a permanent injunction against enforcement of the tribal court judgment on the ground that it was void for lack of jurisdiction. The federal district court agreed that the tribal court lacked jurisdiction and promptly granted judgment in favor of the county and the law enforcement officers. The Nez Perce Tribe, including the tribal court and the judges of the tribal court, appealed to the Ninth Circuit Court of Appeals.

Almost eleven (11) years have now lapsed and the entire issue is still pending in the Ninth Circuit Court of Appeals. The case was originally argued and submitted to a three-judge panel November 16, 1995. The matter was withdrawn from submission March 20, 1997, for the reason that the panel was awaiting the decision of this Court in *Strate*. The matter was resubmitted July 1, 1997 and the order and opinion affirming the district court judgment was filed April 23, 1998. Amended opinions were filed May 5, 1998, and July 24, 1998. By order

filed July 31, 1998, the Ninth Circuit ordered that the case be re-heard by the Court of Appeals en banc. The case was argued to the Court sitting en banc on September 28, 1998. A decision is still pending.

Importantly, this needless waste of time and resources cannot be justified by any reference to a *congressional* directive—either in *Allen* or in this case. Accordingly, this Court should be especially reluctant to adopt the expansive reading of the exhaustion doctrine that the Ninth Circuit Court of Appeals has accepted.

ARGUMENT

I. THE HISTORY OF THE PRICE-ANDERSON ACT REVEALS THE INCOMPATABILITY BETWEEN TRIBAL COURT JURISDICTION AND THE FEDERAL STATUTORY SCHEME.

The exercise of jurisdiction by Indian tribes is inconsistent with the history of the Price-Anderson Act, as Petitioners and supporting *Amici* States have pointed out. This Court should find a jurisdictional prohibition of tribal jurisdiction when the history of congressional legislation and the surrounding circumstances reveal a disabling incompatibility between tribal court jurisdiction and the intended operation of a federal statutory scheme.

This Court relied upon the history of congressional legislation to determine the parameters of tribal court jurisdiction over non-members in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 202 (1978) and *Duro v. Reina*, 495 U.S. 676 (1990). *See also, South Dakota v. Bourland*, 508 U.S. 679, 689 (1993). Similar considerations should be controlling here.

In addition to the unnecessary delay and expense noted above, it is also important to specially emphasize the fact that fundamental Constitutional rights are not ordinarily enforceable in tribal courts. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). As a result, this Court in

Strate was clearly on solid ground when it narrowed the scope of the tribal exhaustion doctrine. This case calls for a similar conclusion.

CONCLUSION

For the foregoing reasons, the decision of the Ninth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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